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Supreme Court of the United States

No. 642

OCTOBER TERM, 1963

JOEL A. BURNS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HILTON R. CARR, JR.
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TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, JOEL A. BURNS, respectfully prays that a writ of certiorari issue to review the judgment below of the United States Court of Appeals for the Fifth Circuit. This judgment affirms petitioner's conviction on two counts charging crimes in connection with the use of the mails to defraud in connection with the offer and sale of securities in violation of U.S.C.A. §77 q(a) and unlawfully making use of the mails to sell a security with no registration statement being in effect with the United States Securities and Exchange Commission in violation of 15 U.S.C.A. §77 e(a)(1).

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit has not as yet been reported but is set forth in Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1). The judgment below was entered on September 27, 1963 (R. 241) and is attached as Appendix B. By Order Extending Time to File Petition for Writ of Certiorari dated October 23, 1963 Justice Hugo L. Black ordered that the time for filing a petition for writ of certiorari in this cause be extended to and including November 26, 1963.

FEDERAL STATUTE INVOLVED

The Federal Statute involved in this case is as follows:

15 U.S.C.A. §77 v. (c)

> No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Commission, or in obedience to the subpena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or

forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED

Rule 32. *Sentence and Judgment.*

(d) *Withdrawal of Plea of Guilty.* A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States:

"No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

QUESTIONS PRESENTED

1. DOES A GUILTY PLEA CONSTITUTE A WAIVER OF A PREVIOUSLY ATTAINED IMMUNITY FROM PROSECUTION.

2. WHERE A WITNESS ASSERTS HIS CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION BEFORE THE SECURITIES AND EXCHANGE COMMISSION AND TWO YEARS THEREAFTER IS REQUIRED BY SUBPOENA DUCES TECUM TO PRODUCE ALL RECORDS PERTAINING TO CERTAIN FIRMS AND PURSUANT TO SUCH SUBPOENA DOES PRODUCE HIS PERSONAL RECORDS AND THEREAFTER TESTIFIES BEFORE THE COMMISSION, IS SUCH WITNESS ENTITLED TO IMMUNITY FROM PROSECUTION AND PENALTIES UNDER THE PROVISIONS OF 15 U.S.C.A. 77 v(c).

STATEMENT OF THE CASE

The petitioner was indicted in the Southern District of Florida for violations of the Securities and Exchange Act. Petitioner was also a defendant in two criminal cases in the District of Utah involving substantially the same transactions.

The petitioner was asked by the Securities and Exchange Commission on September 16, 1957 to give testi-

mony in a criminal investigation of the Columbus-Rexall Oil Co. Petitioner at that time claimed his constitutional privilege against self-incrimination. On October 24, 1960 petitioner was served with a subpoena duces tecum from the Commission commanding him to appear and produce certain items. Petitioner responded to the subpoena by turning over various materials, including his personal diary and other personal records. Thereafter he appeared before the Commission and testified on two different occasions.

Petitioner was indicted in the Southern District of Florida on May 31, 1961. On January 12, 1962 one count of the indictment was transferred to Utah. On January 24, 1962 petitioner's motion to dismiss, based on his claim of immunity under 15 U.S.C. 77v(c), was denied (R 225-226). Thereafter, on January 26, 1962 petitioner entered guilty pleas to two counts of the indictment and the remaining counts were dismissed. On Friday, February 16, 1962 the court entered judgment pursuant to the pleas of guilty and imposed sentence upon the petitioner (R 116-118). On Monday, February 19, 1962, petitioner filed a motion to withdraw pleas of guilty and to vacate adjudication of guilt and sentence (R 118). The motion alleged that manifest injustice had been done in that on February 16, the very day petitioner was convicted and sentenced in the Florida Court under guilty pleas, the Utah Court had recognized his claim of immunity and had dismissed the indictments pending there. The motion was denied. Three additional motions seeking to have the adjudication of guilt vacated on the ground that petitioner was immune from prosecution at the time he entered the guilty pleas were made and denied. On appeal, the Fifth Circuit affirmed the judgment and sentence, holding that

the guilty pleas, in the absence of proof that they were coerced or made otherwise than freely, voluntarily and with full understanding of the consequences as well as all constitutional rights involved, constituted a waiver of any previously attained immunity. The affirming opinion is attached hereto as Appendix A. The present petition is directed to this affirming opinion.

REASONS FOR GRANTING THE WRIT

1. The decision below is in probable conflict with this Court's decisions in *Counselman v. Hitchcock, 142 U.S. 547* and *Smith v. U.S., 337 U.S. 137.*

The Fifth Circuit in the decision below held:

> "It is our opinion that the guilty pleas, in the absence of proof that they were coerced or made otherwise than freely, voluntarily and with a full understanding of the consequences involved, constitute a waiver of a previously attained immunity."

Thus, the Fifth Circuit ruled that a previously attained immunity is not absolute, but is subject to being waived. Such a ruling is in conflict with the decisions of this Court in *Counselman v. Hitchcock, 142 U.S. 547* and *Smith v. U. S., 337, U.S. 137.* In *Counselman v. Hitchcock, supra,* this Court set forth the doctrine that a statutory enactment compelling testimony, to be valid, must afford *absolute* immunity against future prosecutions for the offense to which the question relates. In *Smith v. United States, supra,* this Court described the immunity statute there involved as a " . . . remission of responsibility for criminal acts" and again reiterated that, " . . . only

absolute immunity from federal criminal prosecution is sufficient to compel the desired testimony." (emphasis added)

It is true that the privilege against self-incrimination may be waived, but when claimed it is guaranteed by the Constitution. Only absolute immunity from federal criminal prosecution is sufficient to supplant the constitutional privilege. *Smith v. United States, supra.* Once immunity is attained, responsibility for criminal acts is remitted and the protection afforded by the immunity statute is complete and absolute. The decision of the Fifth Circuit sought to be reviewed reduces the status of immunity from absolute to conditional. The law as set forth by this Court in the above decisions is that immunity, once attained, is and must be absolute. The constitutional privilege may be waived; the statutory immunity which supplants an asserted privilege must be absolute.

2. The petition should be granted to consider questions of importance in the administration of justice in the federal courts.

In the decision sought to be reviewed the Fifth Circuit ruled that a plea of guilty constituted a waiver of a previously attained immunity. The questions as to when the defense of immunity may be asserted and the effect of a plea of guilty on such defense are questions of importance in the administration of justice in the federal courts which should be answered by this Court.

It is generally held that a voluntary plea of guilty constitutes an admission of the pleaded facts and a waiver

of all non-jurisdictional defects, *United States v. Hetherington, 7th Cir., 279 F. 2d 792*, but does not constitute a waiver of jurisdictional matters, *LaFeuer v. United States, 7th Cir., 257 F. 2d 271.* As stated in *Caballero v. Hudspeth, D. C. Kan., 36 F. Supp. 905, 906:*

> ". . . a plea of guilty waives defects in the mere form of the allegations of an indictment, but it does not cure defects in substance. It confesses nothing beyond that which is actually charged (in this case one offense). 22 C.J.S. Criminal Law §424, p. 658. The objection that the indictment is lacking in elements essential to warrant the sentence imposed is not waived. Nicholson v. United States, 8th Cir., 79 F. 2d 387."

By virtue of the immunity provisions of the statute here involved (15 U.S.C. §77 v(c)) Congress has withdrawn from the federal courts the jurisdiction to either (1) try the individual on any charge as to any transaction, matter, or thing concerning which he has been compelled to testify or (2) to subject such individual to any penalty or forfeiture.

In *United States v. Harris, 133 F. Supp. 796*, the Court granted relief under Rule 35 after a plea of guilty where it appeared that the particular counts were barred by the statute of limitations which provided that, " . . . no person shall be prosecuted, tried or punished . . . " unless the indictment was found within the prescribed time. The Court held that the language of the statute deprived the Court of jurisdiction to pronounce a judgment of guilty. The Court stated,

> "It seems to me that in the circumstances here that the statute presented a situation that deprived the court of jurisdiction to pronounce a judgment of guilty upon defendant under Counts 3 through 22, inclusive.
>
> "Though the plea of guilty admitted all the facts averred in the information, which, as respects Counts 3 through 22 here, alleged crimes that were barred by the limitations of Section 3282, it did not constitute a waiver of jurisdictional defects. . . ".

By like reasoning, the language of 15 U.S.C. §77 v(c) that, ". . . no individual shall be prosecuted or subjected to any penalty or forfeiture. . . " deprives the federal court of jurisdiction to enter a judgment of guilty, and a plea of guilty does not waive such lack of jurisdiction.

In *Edward v. United States, 312 U.S. 473*, this Court upheld the sufficiency of a plea in bar upon a claim of immunity in a case where the defendant had entered a plea of nolo contendere after the trial court had overruled his plea in bar. A plea of nolo contendere has the effect of a plea of guilty for the purposes of the case. *United States v. Norris, 281 U.S. 619*.

By the ruling of the Fifth Circuit a defendant who has no defense other than his claim of immunity must put the government, and himself, to considerable expense to go through an entire trial in order to assert his immunity on appeal for, by pleading guilty after his plea of immunity is overruled the defendant has waived his claim of immunity. The petitioner respectfully submits

that, in the exercise of this Court's supervisory powers over the administration of justice in the federal courts, this Court should decide the question as to the effect of a plea of guilty as to a previously attained immunity.

3. The petition should be granted to consider questions of importance arising under the Fifth Amendment to the Constitution of the United States.

On September 16, 1957 petitioner claimed his constitutional privilege against self-incrimination before the Securities and Exchange Commission. On October 24, 1960 petitioner was served with a subpoena to produce all records pertaining to certain firms and warning petitioner "Fail not at your peril". Pursuant to such subpoena petitioner produced his personal records and thereafter appeared before the Commission and testified on two different occasions. The District Court of the Southern District of Florida ruled in a pre-trial hearing that the claim of privilege made in the initial hearing was not carried forth to subsequent hearings and that the production of his personal records was a voluntary act and no immunity attached. The Utah Court recognized petitioner's claim of immunity and dismissed the indictments pending there. The Fifth Circuit, in ruling that petitioner's plea of guilty constituted a waiver of immunity, did not decide whether immunity ever attached.

By the clear wording of the statute, the immunity attaches when an individual (1) claims his privilege against self-incrimination and (2) is thereafter compelled to testify or produce evidence. The witness need not request immunity and no grant of immunity need be specifically bestowed. The statute is clear on its face

and means to the layman simply that if he is compelled to produce evidence after having once asserted his privilege, he is to have immunity. Compare *United States v. Monia, 317 U.S. 424.*

Petitioner claimed his privilege on September 16, 1957. Thereafter, on October 24, 1960 he was compelled by subpoena to produce his records. Immunity was attained. Compare *United States v. Eisele, D.C.D.C. 52 F. Supp 105; United States v. Goodner, D.C. Colo., 35 F. Supp. 286.* The refusal of the District Court and the Court of Appeals to accord immunity to petitioner denies to him his rights under the Fifth Amendment.

To condition immunity upon procedural technicalities of pleading is to reduce the protection of immunity statutes below the protection afforded by the Fifth Amendment and thereby invalidate all immunity statutes. For, once a witness has incriminated himself under the supposed absolute protection of an immunity statute he finds such protection not to be absolute but dependent upon rules of pleading and procedure. To hold, as did the Fifth Circuit, that immunity once attained, is anything less than a complete remission of criminality deprives a witness of the full measure of protection to which he is entitled under the Fifth Amendment.

CONCLUSION

Petitioner respectfully submits that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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By Herbert A. Warren

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Petition for Writ of Certiorari was mailed to the Solicitor General, Department of Justice, Washington, D. C. this 25 day of November, 1963 by depositing the same in a United States post office with air mail postage prepaid and addressed to the Solicitor General, Department of Justice, Washington, D. C.

I FURTHER CERTIFY that a copy of the foregoing Petition for Writ of Certiorari was mailed to the office of the United States Attorney for the Southern District of Florida, Federal Building, Miami, Florida, this 25 day of November, 1963.

Herbert A. Warren, Jr.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 19646

JOEL A. BURNS,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(September 27, 1963.)

Before BROWN, GEWIN and BELL, Circuit Judges.

GEWIN, Circuit Judge: This is an appeal from rulings of the District Court for the Southern District of Florida, denying post conviction motions seeking, in essence, a reversal of pre-conviction rulings holding that the appellant is not immune from criminal prosecution.[1] The appellant Burns, along with a number of others, was

[1] Numerous motions were filed in the trial court before the defendant finally entered a plea of guilty.

indicted in the Southern District of Florida for violations of the Securities and Exchange Act. Burns was also a defendant in two criminal cases in the District of Utah involving substantially the same transactions. Prior to his trial in Florida, Burns filed numerous motions seeking, among other things, to quash the indictment, and to sever and transfer the cause to Utah so that it might be consolidated with the cases pending in Utah.

These motions and the court's rulings on them are far too numerous and voluminous to merit individual elaboration in this opinion. We have considered all of them. After a careful review of the record and briefs before us, we have concluded that the District Court did not abuse his discretion, and committed no harmful error in his handling of any of the various motions. We find no merit in the errors specified.

While not of controlling importance in this case, we feel it appropriate to mention the fact that some of the proceedings in this case were not recorded by the official court reporter as required by 28 U.S.C.A. 753(b).[2] For example, counsel for appellant makes an affidavit in which he states that at a hearing before the trial judge on the 5th day of January 1962, seeking a transfer of the cause pursuant to the provisions of Rule 21(b) F.R.Crim.

---

2 This section provides as follows:

"One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of the court or by one of the judges, and shall record verbatim by shorthand or by mechanical means: (1) all proceedings in criminal cases had in open court . . ."

P., it was his understanding that the Court made an oral ruling stating that he would transfer the cause to the State of Utah. This affidavit conflicts with the action actually taken by the trial judge, as shown by order dated January 10, 1962 (filed January 12, 1962) wherein he ordered only that the 36th count of the indictment be severed and transferred to the U. S. District Court for the District of Utah. We do not approve of the practice of failing to comply with the code section mentioned. It should be followed by trial courts. In this case we do not find prejudicial error; and failure to comply with the statute is not error per se. *Fowler v. U. S.*, 5 Cir. 1962, 310 F.2d 66; *Strauss v. U. S.*, 5 Cir. 1963, 311 F.2d 926; *Addison v. U. S.*, 5 Cir. 1963, 317 F.2d 808.

The claim of immunity from prosecution, which is entwined in all of the pre-trial and post conviction motions, and pursued so diligently on this appeal, commands our careful attention. The claim of immunity is based on the following statute:

Title 15 U.S.C.A. § 77v(c):

> "No person shall be excused from attending and testifying nor from producing books, papers, contracts, agreements and other documents before the Commission or in obedience to the Subpoena of the Commission or any member thereof or any officer designated by it, or in any cause or proceedings instituted by the Commission, on the grounds that the testimony or evi-

> dence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture; no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination to testify or produce evidence, documentary or otherwise, except that such individuals so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying."

On September 16, 1957, Burns was asked by the Securities & Exchange Commission to give testimony in a criminal investigation of the Columbus-Rexall Oil Company, in which he had recently been an officer and director. Burns through his attorney claimed that the Commission's order was too broad to give him proper notice as to the subject and scope of the inquiry on which he was to be interrogated, and he therefore claimed his constitutional privilege against self-incrimination. Burns' attorney made the following request:

> "Let the record show that if the Commission will grant Mr. Burns immunity from any possible prosecution as a result of any answers he might give during the course of this proceeding, that he will be delighted to comply with the requests of the staff of the Commission."

The Commission Examiner replied:

> "Mr. Lee: Let the record show that this office has no authority at this time to extend to you, Mr. Burns, the immunity provided by section 21(b) of the Securities Act of 1933.
>
> "Let the record show further that [we] ceased our interrogation then where you claimed your privilege against self-incrimination."

Over three years later on October 24, 1960, Burns was served with a subpoena duces tecum from the Commission commanding him to appear and produce:

> "All original correspondence, memoranda, books and other records, of whatever nature, or copies thereof, of or pertaining to Columbus Rexall Consolidated Mines Company or Columbus-Rexall Oil Company and the predecessors or successors thereof; Beachline Production Corporation, a Nevada Corporation, Adaven Oil Company, a Nevada Corporation; Titan Uranium, Inc., a Nevada Corporation; Great Chief Uranium Company, a Nevada Corporation; San Rita Oil, Inc., a Utah Corporation; United Caribbean Oil and Mining Enterprises, Inc., a Liberian Corporation; United Caribbean Oil, Inc., a Cuban corporation; and Albercalif Petroleum, Ltd., a Canadian corporation, of Long Beach, California, which may be held in your possession, custody or control.
>
> "The books, papers and documents to be produced shall include, but are not of necessity

limited to; articles of incorporation; letters; memorandums; journals or other records of original entry; ledgers, bank deposit slips; bank statements; cancelled bank checks; purchase and sales contracts; deeds; leases; assignments; minutes of meetings of stockholders and directors; capital stock certificates, issued and unissued, cancelled or uncancelled; lists of stockholders; capital stock ledgers; and other records; capital stock issuance and transfer data and instructions; invoices; statements of account; income tax returns; tax statements; and vouchers."

The subpoena contained the customary clause, "Fail not at your peril". Burns responded to the subpoena by turning over various material including his personal diary and other personal records. Thereafter, he appeared before the Commission and testified on two different occasions. Each time he was informed by the examining officer of his privilege not to testify, if to do so would tend to incriminate him. Burns concedes that he was never specifically granted or promised immunity, orally or otherwise, by anyone connected with the S.E.C. He does claim that based on information given him by his attorney, just after the first contact with the S.E.C. in September of 1957, he believed that the issuance of the subpoena duces tecum by the S.E.C. constituted an acceptance of his aforementioned offer of testimony in return for immunity. He claims that notwithstanding the continued and repeated advice and warning by the examining officers of his privilege not to testify, he believed

that immunity attached as soon as he got the subpoena; and that the material produced in response thereto and his testimony at the hearings were protected by the above quoted statute.

Burns was indicted in the Southern District of Florida on May 31, 1961. On January 12, 1962, one count of the indictment was transferred to Utah. On January 26, 1962, with the advice of experienced counsel, Burns entered guilty pleas to two counts of the indictment, and the remaining counts were dismissed. On February 15, Burns moved for leave to substitute a nolo contendre plea for the guilty pleas, alleging that he felt a guilty plea would bar appellate review of his claim of immunity. On the following day, February 16, when the case came on for sentence proceedings, Burns withdrew the motion to substitute. His attorney stated to the court:

> "Your Honor, there is a pending motion in this matter, but after consultation with Government counsel and with the defendant, we withdraw that motion."

The court entered appropriate judgment pursuant to the pleas of guilty and sentenced Burns to two years under each count. The sentences were suspended and were to run concurrently. In addition, a $10,000.00 fine was imposed.

After sentence Burns filed a motion to withdraw the pleas of guilty and to vacate the adjudication of guilt and sentence, alleging that the purpose of the motion

"is to correct manifest injustice as provided for in . . . Rule 32(d) of the F.R.Crim.P."[3] The motion alleged that manifest injustice had been done in that on February 16, the very day he was convicted and sentenced in the Florida court under his guilty pleas, the Utah court had recognized Burns' claim of immunity and had dismissed the indictments pending there. There was no claim of innocence or coercion in the filing of the guilty pleas. No other grounds on which to predicate "manifest injustice" were alleged. In fact, there has been no denial of guilt at any point, including this appeal. That appellant concedes his guilt is shown in a clemency plea made by his attorney at the sentence proceedings:

> "This man is now 37 years of age. At the time of the offense charged here to which he has entered a plea, he was 31 years of age. I think he became involved by a matter of flattery. . . . He did not at the time feel that he was doing anything improper. He was doing pretty much what he was being directed to do by older and more experienced persons."

Three additional motions were made, all seeking to have the adjudication of guilt vacated on the ground that appellant was immune from prosecution at the time he entered guilty pleas and was convicted. All of these post conviction motions were denied.

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[3] Rule 32(d), Federal Rules of Criminal Procedure:
"A Motion to Withdraw a Plea of Guilty or of Nolo Contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the Court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

In one of the pre-trial hearings on a motion to dismiss based on the claim of immunity, the District Judge found that Burns' delivery of his personal records was a voluntary act and was not done in response to the subpoena duces tecum:

> "In reference to the motion of Mr. Burns concerning his claim of immunity, based on the law as I have been able to read it yesterday afternoon, I am of the opinion that while he had generally asserted his claim of privilege in the initial hearing, that it is not carried forth into the subsequent hearings, and at the time that he delivered certain allegedly personal records when he was subpoenaed, under the reasoning in Landy versus United States, 238 Fed. Second 303, he had no right not to respond nor to refuse to deliver corporate records, it was perfectly proper, as I construe it, to have subpoenaed him to deliver corporate records, so that he couldn't have validly objected to the subpoena. Now, his delivery then of the personal records, as I construe it, was a voluntary act which amounted to a waiver of the privilege."

We are inclined to agree with this finding. However, if appellant's plea of guilty constitutes a waiver of immunity, as the appellee so ably argues, then we need not decide whether immunity ever attached or whether the voluntary—if voluntary it was—production of his personal records constituted a waiver of immunity.

It is our opinion that the guilty pleas, in the absence of proof that they were coerced or made otherwise than freely, voluntarily and with a full understanding of the consequences as well as all constitutional rights involved, constitute a waiver of a previously attained immunity. As mentioned earlier, Burns was represented at all times by able and experienced counsel. In *Warren v. U. S.*, 5 Cir. 1956, 232 F.2d 629, this court said:

> "His plea of guilty, advisedly entered, precludes further inquiry into his complaints that he was improperly searched and that the government failed to prove portions of the indictment."

Later in *Alexander v. U. S.*, 5 Cir. 1961, 290 F.2d 252, we re-affirmed the same principle:

> "If the appellant had submitted his guilt or innocence to a jury and had been convicted we would, of course, guided by Elkins, reverse the conviction. Even in such a case the question could only be considered on appeal and could not be properly raised in a proceeding under Section 2255, Kinney v. United States, 10 Cir., 1949, 177 F.2d 895. However, the error of the trial court was removed from our consideration by the plea of guilty, assuming of course that the plea was advisedly and voluntarily made. Warren v. United States, 5 Cir. 1956, 232 F.2d 629. The mistake of appellant's counsel, if mistake it was, in recommending a plea of guilty, cannot be corrected by us. The entry of the plea of guilty on counsel's rec-

ommendation will not be set aside merely because the recommendation was based upon a legal opinion which subsequent events proved wrong."

From the record we do not gain the impression that Burns was ill advised; or that subsequent events prove that he should not have entered guilty pleas. As a matter of fact, the record supports the inference that Burns came out of a serious situation with rather lenient treatment, which at the time he was glad to receive.[4]

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[4] The following is taken from a memorandum filed in the trial court by Burns in support of petition for rehearing, reconsideration, and for leave to withdraw plea of guilty:

"On January 24th, 1962, immediately following the entry of the oral Order above-described the selection of the Jury for the case at bar was commenced.

"On January 26th, 1962, in the absence of the Honorable GEORGE C YOUNG, Defendant BURNS and another Defendant withdrew the pleas of not guilty previously entered and entered pleas of guilty before the Honorable EMETT C. CHOATE, at which time the Court ordered a presentence investigation made.

"On February 12th, 1962, the Defendant filed a Motion to Substitute the Plea of Not Guilty with a Plea of Nolo Contendere.

"On February 14th, 1962, Judge CHRISTENSON at Salt Lake City signed an Order determining that Defendant BURNS was immune for prosecution and dismissing the two Salt Lake City Indictments.

"On February 16th, 1962, counsel for the Government advised counsel for Defendant that in the event that a Nolo Contendere plea was entered that the Government would not dismiss the remaining thirty-four counts of the Indictment.

"On February 16th, 1962, the Motion to Substitute Plea of Nolo Contendere for Plea of Guilty was abandoned by the Defendant on the basis of representations of Government *couns l* (sic) that the remaining thirty-four counts would not be dismissed in the event that a Nolo Contendere plea was entered in lieu of a plea of guilty.

"On February 16th, 1962, Judge EMETT C. CHOATE sentenced the Defendant to two years confinement, suspended the sentence of confinement, placed the Defendant on probation for a period of two years and fined the Defendant Five Thousand Dollars ($5,000.00) on each of two counts to which he had entered pleas."

The judgment of the court below is in all things AFFIRMED.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By CLARA R. JAMES
Deputy

New Orleans, Louisiana

Oct. 31, 1963

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

October Term, 1962

No. 19646

D. C. Docket No. 12,138-M-Cr.

JOEL A. BURNS,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before BROWN, GEWIN and BELL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

September 27, 1963

Issued as Mandate:

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 642

JOEL A. BURNS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 323 F. 2d 269.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1963. On October 23, 1963, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including November 26, 1963, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner waived a claim of immunity when he voluntarily entered pleas of guilty with the

advice of counsel and with full knowledge of his rights.

2. Whether the District Court in Florida abused its discretion under Rule 32(d) of the Federal Rules of Criminal Procedure when it denied petitioner's motion to withdraw his pleas of guilty made after sentence had been imposed, where that motion was based solely on that fact that, after petitioner had entered his pleas of guilty in Florida, a District Court in Utah upheld a claim of immunity in a companion prosecution.

3. Whether petitioner was ever immune from prosecution.

STATUTE AND RULE INVOLVED

Section 22(c) of the Securities Act of 1933, 15 U.S.C. 77v(c) provides:

> No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Commission, or in obedience to the subpoena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise except that such individual so testifying shall

not be exempt from prosecution and punishment for perjury committed in so testifying.

Rule 32(d) of the Federal Rules of Criminal Procedure provides:

> **Withdrawal of Plea of Guilty.** A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

STATEMENT

1. Petitioner was indicted in the Southern District of Florida on May 31, 1961 on 36 counts charging violations of the Securities Act, mail fraud, and conspiracy (R. 1–46). One count of the indictment was, on petitioner's motion, transferred to Utah for trial (R. 107–109).

Before trial in Florida, petitioner filed a supplemental motion to dismiss the indictment based on the claim that he had acquired immunity under 15 U.S.C. 77v(*c*) (R. 75–86). A hearing on that motion was held on January 23, 1962, just prior to the commencement of petitioner's trial (R. 183–224).

At the hearing petitioner testified that on September 16, 1957, he voluntarily appeared at the offices of the Securities and Exchange Commission in Salt Lake City, Utah, in the company of an attorney, and that both before and after being sworn he claimed his privilege not to testify concerning the affairs of the Columbus-Rexall Oil Company, on the ground that his testimony might tend to incriminate him (R. 186–189). Petitioner was not granted immunity at

this inquiry and indeed was specifically informed that immunity was not granted (R. 82, 198, 140, 204). When petitioner asserted his privilege against self-incrimination, the hearing examiner stated: "Let the record show that this office has no authority at this time to extend to you, Mr. Burns, the immunity provided by section 21(b) of the Securities Act of 1933. Let the record show further that [we] ceased our interrogation then where you claimed your privilege against self-incrimination" (Pet. App. 5).

Three years later, on October 24, 1960, petitioner was served with a subpoena duces tecum issued by the Securities and Exchange Commission requesting production of all records in his possession pertaining to the Columbus-Rexall Oil Company and related corporations (R. 84–85). In response petitioner appeared at the offices of the Commission in Salt Lake City where he deposited various records including certain allegedly personal records (R. 85–86, 193–194, 199). Petitioner, who was not represented by counsel at the time, asserted no claim of privilege as to any of these records: he neither requested nor was offered immunity from prosecution (R. 196–200).

On November 23, and December 20, 1960, petitioner appeared before the Commission in Salt Lake City (R. 147) and testified without asserting his privilege against self-incrimination (R. 196–197, 202–204), although he was advised by the hearing examiner that he was not required to testify (R. 202, 203).

On the basis of the foregoing evidence, the district

court below denied petitioner's claim of immunity (R. 225–226).

2. Immediately after that ruling, petitioner's trial commenced. On January 26, 1962, during the progress of the trial, petitioner entered pleas of guilty to Counts I and XXI of the indictment. The proceedings as to him were severed and continued for sentence (R. 114–115). On February 15, 1962, petitioner moved to withdraw his pleas of guilty and substitute pleas of nolo contendere. The ground for this motion, as stated by petitioner's attorney, was the following (R. 115–116):

> Defendant, Joel A. Burns, has heretofore, through his counsel, filed a Motion to Dismiss on the grounds of immunity granted pursuant to the provisions of Sec. 77v(c) of Title 15 of the U.S.C., which Motion was, after Hearing, denied by the Honorable George C. Young. Counsel for the Defendant feels very strongly that the Defendant is entitled to and should have an appellate review of this ruling and feels that a plea of guilty would bar the right of appellate review and that a plea of Nolo Contendere would not constitute a bar to an appellate ruling.

The following day—the day on which sentence was to be imposed—petitioner, through his attorney, withdrew the pending Motion for Leave to Substitute Plea, thereby deliberately abandoning his claim to a "right of review" of the district court's order denying his supplemental motion to dismiss based on the alleged immunity. In withdrawing the motion, petitioner's attorney stated to the court (Pet. App. 7):

> Your Honor, there is a pending motion in this matter, but after consultation with Government counsel and with the defendant, we withdraw that motion.

A fine of $10,000 and a two-year suspended sentence were then imposed, and counsel for the government withdrew the remaining 33 counts of the indictment (R. 116–118).

3. On February 19, 1962, petitioner filed a motion under Rule 32(d) of the Federal Rules of Criminal Procedure to withdraw his pleas of guilty and to vacate his conviction and sentence (R. 118), on the ground that three days before, on February 16, 1962, the District Court of Utah had recognized his claim of immunity and dismissed the indictment pending there (R. 118–120). The district court denied the motion (R. 143).

Petitioner then filed a petition for rehearing of his earlier motion to dismiss on the ground of immunity (R. 130–131). The district court denied this petition on March 23, 1962 (R. 161). Petitioner next filed a Motion to Vacate Sentence and Stay Proceedings (R. 161) and a Renewed Motion to Withdraw Plea of Guilty, to Vacate Adjudication of Guilt and to Vacate Sentence on the same ground (R. 167). On March 28 and March 29, 1962, respectively, these motions, too, were denied (R. 169, 171).

Petitioner thereupon moved for reduction of the fine which had been imposed against him (R. 170). On April 6, 1962, the district court modified the terms of payment, allowing petitioner additional time to

meet the $10,000 fine, but otherwise denied the motion (R. 172).

The court of appeals unanimously affirmed the judgments of the district court, holding that petitioner's guilty pleas, "in the absence of proof that they were coerced or made otherwise than freely, voluntarily and with a full understanding of the consequences as well as all constitutional rights involved, constitute a waiver of a previously attained immunity" (Pet. App. 10).

Although the court of appeals did not decide whether petitioner ever acquired immunity or whether the production of his personal records constituted a waiver thereof (Pet. App. 9), the court did state that it was "inclined to agree" with the district court's finding that petitioner did not have immunity even prior to his guilty pleas (Pet. App. 9).

ARGUMENT

1. Before entering his pleas of guilty in the Florida court, petitioner unsuccessfully asserted a claim of immunity. He was plainly aware, therefore, that immunity was an issue which he could contest if he so chose. Indeed, even after the plea had been entered, petitioner moved initially to change it to nolo contendere with the declared objective of raising the question of immunity on appeal. Yet, with the advice of counsel, he deliberately withdrew that motion before sentence. There can thus be no question on this record that petitioner consciously and deliberately waived the claim of immunity in Florida, electing instead to rely on the benefits which he thought would

accrue to him from a plea of guilty. His attempted abandonment of that deliberate strategy comes too late.

As petitioner admits (Pet. 7–8), "a voluntary plea of guilty constitutes an admission of the pleaded facts and a waiver of all non-jurisdictional defects." See, *e.g.*, *Thomas* v. *United States*, 290 F. 2d 696 (C.A. 9), motion for leave to file petition for writ of certiorari denied, 368 U.S. 964; *Russell* v. *United States*, 212 F. 2d 87 (C.A. 4), certiorari denied, 347 U.S. 1020; *Harris* v. *United States*, 237 F. 2d 274 (C.A. 8). An immunity defense does not go to the jurisdiction of the court. It is purely a personal defense and, as such, waivable. Moreover, even if immunity were a jurisdictional matter, it would relate only to personal jurisdiction, which, unlike jurisdiction over subject matter, may be waived in a criminal case. *United States* v. *Rosenberg*, 195 F. 2d 583 (C.A. 2), certiorari denied, 344 U.S. 838; *Pon* v. *United States*, 168 F. 2d 373 (C.A. 1); cf. Rule 34 of the Federal Rules of Criminal Procedure. See also *Caballero* v. *Hudspeth*, 114 F. 2d 545 (C.A. 10), which held that the constitutional right against double jeopardy is a personal right which may be waived by a plea of guilty. *A fortiorari*, the right to assert an immunity claim—a statutory defense—may be so waived.

Petitioner's reliance on *Edwards* v. *United States*, 312 U.S. 473, is misplaced, for in that case the accused protected his claim of immunity by entering a plea of nolo contendere. Here petitioner deliberately forfeited his right to raise the claim on appeal by with-

drawing the motion to change his plea to nolo contendere.

To be sure, *United States* v. *Harris*, 133 F. Supp. 796 (W.D. Mo.), held that the defense of the statute of limitations, apparent from the face of the indictment, is not waived by mere failure to raise the issue before plea. That case, however, does not represent the weight of authority; it has constantly been held that a statute of limitation defense may be waived in a criminal case.[1] In any event, the defense of immunity involved here not only did not appear on the face of the indictment, but was consciously waived.

2. In view of petitioner's deliberate strategy, there was no "manifest injustice" in refusing to allow him to withdraw his pleas of guilty after sentence had been imposed. As we show below, his claim of immunity, though subsequently upheld by another court, was of questionable validity. Instead of relying upon that doubtful claim, he purposefully chose to enter a plea of guilty. In doing so petitioner well "knew and understood what was being done and there was not present any circumstances of force, mistake, misapprehension, fear, inadvertence or ignorance of his rights and understanding of the consequences of the plea." See *United States* v. *Colonna*, 142 F. 2d 210, 211 (C.A. 3).

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[1] See, *e.g.*, *United States* v. *Parrino*, 212 F. 2d 919 (C.A. 2), certiorari denied, 348 U.S. 840; *United States* v. *Taylor*, 207 F. 2d 437 (C.A. 2); *Forthoffer* v. *Swope*, 103 F. 2d 707 (C.A. 9); *Askins* v. *United States*, 251 F. 2d 909, 913 (C.A.D.C.); *United States* v. *Troxell*, 12 U.S.C.M.A. 6; *United States* v. *Gelb*, 175 F. Supp. 267 (S.D.N.Y.), affirmed, 269 F. 2d 675 (C.A. 2), certiorari denied, 361 U.S. 822; and cf. *United States* v. *Cook*, 17 Wall. 168.

3. While the validity of the claim of immunity is not at issue here, in view of petitioner's deliberate decision to plead guilty, it should be noted that petitioner's claim was at best debatable.

To avail himself of the immunity provision of the Securities Act of 1933, a witness must establish (1) that he invoked his privilege against self-incrimination; and (2) that he was compelled to testify after having invoked the privilege.[2] When petitioner responded to the subpoena duces tecum of October 24, 1960, by delivering corporate records of Columbus-Rexall Oil Company and certain allegedly personal records to a representative of the Securities and Exchange Commission, he in no way invoked or even mentioned his privilege against self-incrimination. The privilege, of course, would not in any case have applied to the corporate records called for by the subpoena. *Wilson* v. *United States,* 221 U.S. 361; *Curcio* v. *United States,* 354 U.S. 118. And if petitioner desired to assert the privilege as to his personal records it was his duty to claim it specifically and to segregate those records as to which the privilege could be applied. *Landy* v. *United States,* 283 F. 2d 303 (C.A. 5), certiorari denied, 365 U.S. 845; *In re Verser-Clay Co.,* 98 F. 2d 859 (C.A. 10), cer-

[2] Section 22(c) of the Act, 15 U.S.C. Section 77v(c), in pertinent part, reads "* * * [N]o individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is *compelled, after having claimed his privilege against self-incrimination,* to testify or produce evidence, documentary or otherwise except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying." (Emphasis added.)

tiorari denied, 306 U.S. 639; see *Wagman* v. *Arnold*, 257 F. 2d 272 (C.A. 2); *United States* v. *Guterma*, 174 F. Supp. 581 (E.D.N.Y.); *United States* v. *Cayias*, 200 F. Supp. 790 (S.D. Fla.). Admittedly petitioner had invoked the privilege three years earlier, but on that occasion the claim of privilege was honored and petitioner was advised he would not be granted immunity. Under these circumstances, when petitioner responded to a subpoena which called 'generally for the production of corporate records,' he could properly be required to notify

[3] The subpoena duces tecum stated in part that appellant was to appear in the Commission's Salt Lake Office "to testify in the Matter of Columbus-Rexall Oil Co. involving possible violations of Section 9(a) and 5(c) of the Securities Act of 1933, as amended.

"And you are hereby required to bring with you and produce at said time and place the following books, papers, and documents.

"All original correspondence, memoranda, books and other records, of whatever nature, or copies thereof, of or pertaining to Columbus Rexall Consolidated Mines Company or Columbus-Rexall Oil Company and the predecessors or successors thereof; Beachline Production Corporation, a Nevada Corporation; Adaven Oil Company, a Nevada Corporation; Titan Uranium, Inc., a Nevada Corporation; Great Chief Uranium Company, a Nevada Corporation; San Rita Oil, Inc., a Utah Corporation; United Caribbean Oil and Mining Enterprises, Inc., a Liberian Corporation; United Caribbean Oil, Inc., a Cuban Corporation; and Alberc'f Petroleum, Ltd., a Canadian Corporation, of Long Beach, California, which may be held in your possesssion, custody or control.

"The books, papers and documents to be produced shall include, but are not of necessity limited to; articles of incorporation; letters; memorandums; journals or other records of original entry; ledgers; bank deposit slips; bank statements; cancelled bank checks; purchase and sales contracts; deeds; leases; assignments; minutes of meetings of stockholders and directors;

the government that he was including personal records as well. Otherwise a custodian of corporate records could avoid prosecution merely by mingling a few personal records among a large batch of corporate records without asserting a claim of privilege where, as in this case, he had some years earlier made a general claim of the privilege against self-incrimination.

It is significant that at this later hearing petitioner voluntarily chose to testify, although he was explicitly warned of his privilege against self-incrimination.[4]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1964.

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capital stock certificates, issued and unissued, cancelled or uncancelled; lists of stockholders; capital stock ledgers; and other records; capital stock issuance and transfer data and instructions; invoices; statements of account; income tax returns; tax statement; and vouchers." (R. 84–85.)

[4] *United States* v. *Eisele*, 52 F. Supp. 105 (D.D.C.), and *United States* v. *Goodner*, 35 F. Supp. 286 (D. Colo.), cited by petitioner (Pet. 11) in support of his claim of immunity, are inapposite because in both cases the defendant asserted his privilege against self-incrimination at the same hearing in which he was compelled to testify.

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